JAMES R. BR... Clerk

Supreme Court of the United States

October Term, 1961

No. 355

MANNIE GOLDBERG,

Petitioner

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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—VS.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mannie Goldberg, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 24, 1961.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, p. 1a, is reported in 290 F. 2d 729, 1961.

Jurisdiction

The judgment of the Court of Appeals was entered on May 24, 1961 (Appendix, *infra*, p. 15a). A petition for re-

hearing filed June 29, 1961, in the Court of Appeals was entertained by that Court and was denied by it on the merits on August 10, 1961 (Appendix, *infra*, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

Petitioner was convicted of perjury in stating (a) that he did not know one Chait before a certain date, and (b) Chait received no money from petitioner's business. The proof as to "(a)" consisted of direct evidence from one witness plus corroboration by a second witness testifying to oral unsworn "admissions" of petitioner. The proof as to "(b)" followed the same pattern plus documents showing expenditures of petitioner's business with no mention of money paid to Chait. The single "direct" witness testified with vagueness and inconsistency throughout. The "admissions" witness was of the basest credibility and systematically strove to read his prior grand jury testimony to the jury without accepting responsibility for present recollection thereof. The documentary evidence was perfectly consistent with the defendant's innocence. The questions are:

1. Should the case have been submitted to the jury where the "corroboration" consisted of oral, unsworn alleged admissions of defendant?

2. Assuming arguendo that the documentary evidence did "corroborate" those alleged "admissions", is a corroborated, oral unsworn admission sufficient proof of perjury without any direct evidence in the case at all?

3. Was the petitioner's conviction erroneous on the proofs herein? Did those proofs establish perjury beyond a reasonable doubt by either the testimony of two witnesses or one witness and corroborating circumstances?

4. Was the petitioner denied a fair trial by the admission in evidence of testimony from a witness who adopted his prior grand jury testimony as the trial testimony?

5. Was the petitioner denied a fair trial by the admission in evidence of testimony imputing to him the commission of a prior unrelated crime, and by the rereading of said testimony to the jury after it had retired to consider its verdict?

Statutes Involved

The case involves 18 U.S.C. §1621; and New York Penal Law, §2400. The text of these provisions is printed in the Appendix hereto, p. 18a.

Statement of the Case

Petitioner was convicted in the District Court, after a jury trial, on three counts of a four count indictment (D7a)[1] alleging violations of 18 U.S.C. §1621 (perjury)—under which statute the District Court's jurisdiction was invoked—and he was sentenced to three years' imprisonment on each count, to run concurrently, and fined $2,000 on each count (D195a; Appendix, *infra*, p. 2a).

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[1] "D—a" refers to the "Appellant's Appendix" (printed) in the court below, nine copies of which are filed herewith.

Petitioner appealed to the Court of Appeals from the judgment of conviction (D197a). The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction (Appendix, *infra*, p. 15a). Petitioner is free on bail pending the instant proceedings in this Court.

The allegedly perjured testimony was given in May and June, 1956, before a Federal grand jury investigating possible violations of the laws relating to racketeering, 18 U.S.C. §§1951 and 371 (D7a-13a).[2] The investigation was particularly concerned with alleged garment-district truck racketeering activities of one Abe Chait (*ibid;* D126a-127a, D188a-189a, D192a).

In August, 1945, petitioner and one Joseph Stern had formed a partnership to engage in a trucking business, known as Stern's Express Co. (D7a, D31a). The Government was apparently endeavoring to find out from petitioner whether Chait was responsible for petitioner's entering into the partnership and whether Chait received any money from it. (D7a-13a). Counts I and IV of the subsequent perjury indictment related to petitioner's denials before the grand jury that he knew Chait before forming the partnership; Count IV included an averment that petitioner said he had first met Chait after formation of the partnership, when he would see Chait "walking through the street," Chait's own business having been "across the street:" Count IV also included a denial by petitioner that Chait had anything to do with petitioner's going into Stern's Express, but the indictment did not charge that this last was false (D7a, D11a, D13a). Count II related to petitioner's denial to the grand jury that Chait ever received any money from Stern's Express (D8a-9a). Count

[2] Petitioner had and has no prior criminal record (D185a, 191a).

III, relating to petitioner's denial that Chait was a partner in Stern's Express (D10a-11a), was dismissed by the District Court for failure of proof (D133a-134a).

The materiality of the grand jury testimony was stipulated (D15a).

The Government's witnesses to support Counts I and IV (as to when petitioner met Chait) were petitioner's partner Stern, and one Irving Mishel. Only Stern was offered for "direct" evidence; Mishel "corroborated" Stern *per* "admissions" of the petitioner.

The opinion of the court below presented the following as Stern's testimony on Counts I and IV (Appendix, *infra*, p. 3a):

> "* * * that Stern had seen Goldberg and Chait together once or twice, 'talking nice,' before August 1945 when Stern's Express started, and that the partnership was arranged at a meeting between Stern and Goldberg which Chait attended."

However, Stern's own words do not positively say, anywhere in his testimony, that the time of his having seen petitioner and Chait "together" or "talking" was before August 1945 (D32a, D51a-54a, D62a-63a);[3] his words concerning the partnership meeting are immediately followed by reiterative failures of recollection about that meeting and a description susceptible of meaning that only Stern and petitioner were present (e.g., D32a-39a); and Stern's testimony as a whole (on all of the counts) was so uncertain, inconsistent and confused as to cause both the Gov-

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[3] These pages of the printed Appendix contain Stern's entire testimony relating expressly to the subject matter of Counts I and IV.

ernment and the District Court to speak disparagingly of it (D127a, D152a, D169a, D185a, D186a-187a).

We next note how the above "direct evidence" of Stern as to Counts I and IV was "corroborated" by Mishel, a witness of the lowest order of credibility,[4] who happened to have resided some years before in the same apartment house as petitioner (D80a). The opinion of the court below presented the following as the "corroboration" given by Mishel (Appendix, *infra*, p. 3a, 4a; see D105a):

> "[Petitioner had told Mishel] that when he come out of the service he figured he was going to go back in the shylocking business but instead he met Big Dick who was connected with the Chaits * * * And Chait said 'Listen, I got a trucking business. I will put you in. We will work out a proposition.' So he went in to Stern's Express."

It will be noted that this alleged "admission" is irresolvably ambiguous as to whether Chait himself rather than "Big Dick" or some other intermediary actually did the alleged speaking to petitioner about going into Stern's Express. Moreover, the said alleged "admission" of the petitioner was brought in at the trial through the medium of being read by Mishel from his grand jury testimony D(104a-105a).[5] The court below seems to have acknowl-

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[4] See D77a-79a, D81a-84a, D114a-117a, D119a, for Mishel's long criminal record, his fencing with the District Court as to "self-incrimination", and the posture of his hopes for parole from his then incarceration.

[5] The ambiguity just noted, of which the Government was of course well aware from the time of Mishel's grand jury testimony, doubtless explains why, as above mentioned (p. 4, *supra*), the indictment pointedly refrained from charging falsity to the petitioner on this phase of his own grand jury testimony, i.e., on his denial that Chait put him into Stern's Express (D13a). Nevertheless testimony on this subject was freely admitted over defense objection (e.g., D104a-105a).

edged that a serious issue was presented as to whether Mishel had no present recollection but merely avowed having given the testimony before the grand jury (Appendix, *infra*, p. 6a). This issue infused Mishel's indispensable "corroborative" testimony in literally every line and word thereof where material controverted points were presented under all counts of the indictment (D94a-109a, D110a, D117a-119a), as, time after time, he asserted failure of present recollection as to substantive facts (e.g., D95a-100a, D102a, D103a, D105a); claimed that he recalled making statements to the grand jury (e.g., D101a, D102a), that if he said something to the grand jury it was then the truth (e.g. D97a 98a, D101a, D102a), and evasively responded, when asked if specific grand jury testimony was true, with such expressions as "if you let me see my statements I will be glad to read into the record whatever I did say" (D101a), "the statement is the same as I made then" (D102a), "my answer is the same today" (D102a), "that was my answer then; it is my answer now" (D104a), "I was asked this in front of the grand jury and I answered it to the grand jury" (D104a), "all I recall is making the statement and I know it was true then and I believe if this is a certified statement it is true now" (D105a),[6] "did I make a statement about that in there? If I made the statement, whatever I made were the facts * * * That is the answer I gave" (D106a), "the best of my recollection now is that anything I said then was the truth" (D107a). (The foregoing was in Mishel's direct examination by the Government.)

During cross-examination, Mishel, umbraged at defense emphasis upon his notable criminal record (D113a-116a),

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[6] The answer last quoted referred to the sole "corroborative" item for Counts I and IV adduced in the opinion of the Court as quoted below at p. 3a, *infra* (see D105a).

spoke words (D117a) which the court below deemed a sufficient declaration by Mishel of present recollection-refreshed, notwithstanding the "hostility" motivation which, the Court also said, could be attributed to Mishel's sudden access of refreshment (Appendix, *infra*, p. 6a).

The record discloses that the quality of the Government's proofs on Counts I and IV caused difficulty in the jury room, as the jurors twice had to request the Court for a rereading of the testimony showing "whether there were definite statements" by Stern and Mishel that petitioner knew Chait before the trucking partnership was formed (D178a-179a).

On Count II, relating to Chait's alleged receipt of money from Stern's Express, the only direct evidence was, again, by Stern (D32a-46a, D47a-51a, D54a-62a, D63a-75a). But it was undisputed that his testimony was not "positive". The Court below pointed out, after delineating some of Stern's testimonial gyrations, that he "ended up by saying, in answer to an endeavor by the Court to reconcile his testimony on direct and on cross-examination, "I don't know whether he [Chait] got any money exactly" (Appendix, *infra*, pp. 4a, 5a). The District Court, as seen, had disparaged Stern's testimony as a whole (p. 6, *supra*). The prosecutor, writing off Stern as an effective witness under Count II, stated "frankly" that the Government's proofs regarding the payments to Chait "come from the admissions of the defendant [*per* Mishel again—see below] * * * corroborated by the documentary evidence [*per* witness Hassell—see below] * * * " (D127a).

This left, under Count II, solely testimony by Mishel of alleged conversational admissions by the defendant, and

"corroborative" testimony of an F.B.I. accountant (Hassell) analyzing the trucking concern's books and records. Mishel's Count II testimony adduced by the Court below was that petitioner "had told him Chait was getting money from Stern's Express—'something like' $200 a week, although 'It could have been $150; it could have been $250' " (Appendix, *infra*, p. 4a; see D102a).[7] This item was, again, one that was read by Mishel from his grand jury testimony (D103a-104a). In his direct testimony at the trial he never once accepted responsibility for "present recollection" of that grand jury testimony (D100a-104a), and in fact he expressly cast doubt on its accuracy, indicating that the subject matter of his alleged conversations with petitioner about the trucking firm's expenditures could have related not to money for Chait but to legitimate expenses of the trucking business (D100a). Mishel's belated access of present recollection, when he took offense at the cross-examination (p. 8, *supra*) was in blanket terms, not specifically addressed to his testimony on Counts I and IV on one hand, or that on Count II on the other (D117a).

The F.B.I. accountant, Hassell, "corroborating" Mishel's testimony of petitioner's "admissions", presented a 15-sheet analysis or chart of the trucking concern's books and records for 1945 to 1953 purporting to show that a weekly item for unidentified "expenses" was more or less consistently in an amount that *could* indicate money being drawn out by or for *someone* on a basis more or less equal to the weekly drawings of Stern and the petitioner (Exh. 23[8], in Ev. D87a; see D84a-90a). The court below described

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[7] Mishel's entire testimony relating specifically to Count II appears at D100a-104a.

[8] Nine copies of this exhibit are filed herewith.

Hassell's chart (Appendix, *infra*, p. 5a) and termed it "compelling" (*id.*, p. 11a).[9] Actually, neither the chart nor the company books from which Hassell derived it, showed any payments to or for Chait. It was not only pure speculation that the trucking firm's weekly "expenses" were paid virtually *in toto* for eight years to an Abe Chait or to any other secret "partner"; the Government's proofs left it wholly to speculation as to *any* purpose for which those amounts were spent if they were not legitimate business expenses. The amounts involved, averaging considerably less than ten per cent of the gross cash disbursements, were not on their face inconsistent with a legitimate "expenses" budget for a company maintaining a fleet of busy trucks. The court below referred to "synchronization of the jumps in unidentified 'expenses' with increases in the partners' drawings" and said this could not be accounted for solely by the fact that the total expenses of the business were increasing as shown on Exh. 23 (Appendix, *infra*, p. 11a). But the Government advanced neither proof nor theory to negate the quite conventional possibility that the "synchronization" meant the partnership was able to afford larger "expense accounts" for its principals "synchronizedly" with its ability to afford each increase in their "drawings"; or, as suggested by defense counsel at the trial (D125a-126a), that for all that appeared the petitioner and Stern or either of them were simply drawing out extra money for themselves.

The defense duly reserved, by various motions, objections, exceptions and requests, all of which were denied, its

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[9] The trial judge, however, said "I don't think this analysis is very strong in proof that the money went to Chait, which is really the issue in the case" (D132a).

positions that the above proofs were inadmissible, and inadequate for submission to a jury in a federal perjury prosecution, not submitted to the jury under proper instructions, and inadequate to sustain the verdict of conviction (D 24a, D47a-48a, D101a, D104a, D106a, D120a-132a, D133a, D176a, D184a-185a).

The District Court submitted the case to the jury under a charge on the "two-witness rule" and on the general rule of proof in perjury which omitted all reference to the standards that the direct evidence in such proof must be "positive", that the corroborative evidence of such proof must be "strong" and "inconsistent with innocence", and that such proof as a whole must be "clear and convincing" (D170a-172a). The charge also omitted any instruction on the probative adequacy of "admission" testimony consisting of alleged oral unsworn statements of the accused, on the relationship of such "admission" testimony to the presence or absence of sufficient *prima facie* "direct" evidence in this trial record, or on any phase of the law relating to such "admission" testimony in federal perjury cases (*ibid.*).

The District Court declined defense requests to charge the jury that there was no direct evidence in the case, that unless the jury believed Mishel they must acquit, and that Exhibit 23 (Hassell's chart) was not sufficient as a matter of law to constitute corroboration of one direct witness (D176a).

The court below, in entertaining all of the contentions advanced in petitioner's appeal (Defendant-Appellant's Br., pp. 1-9, 12-26) addressed to the adequacy of the proofs and the jury instructions thereon, considered and rejected

all of the points embraced in our preceding last three paragraphs herein (Appendix, *infra*, pp. 9a, 11a, 12a). Specifically, the court below held that, on Counts I and IV, there was "direct evidence" by Stern that petitioner knew Chait before August 1945, "adequately corroborated by Mishel's testimony that [petitioner] had admitted as much," citing the *Vetterli* case (cited and discussed pp. 17, 18, *infra*) (Appendix, *infra*, p. 10a); and that, on Count II, the Government's case would stand sufficiently proven by Mishel's "admission" testimony "corroborated" by "records" (Hassel's chart and the firm's books) within the meaning of *United States* v. *Wood*, 14 Pet. 430, and that in any event Stern's "halting and • • • weakened" testimony that payments were made to Chait "provided the tesimony of one witness • • • and the books would have been sufficient corroboration alone, *a fortiori* when coupled with defendant's admission to Mishel", relying on the *Arena* case (cited and discussed at pp. 13, 16, *infra*) (Appendix, *infra*, pp. 11a, 12a).

The court below also found unmeritorious petitioner's contentions of prejudice resulting from Mishel's adopted grand jury testimony (*id.*, p. 6a), and the imputation to petitioner of the prior unrelated crime of usury by the Government's elicitation of Mishel's grand jury remark that petitioner admitted "shylocking" (*id.*, p. 12a).

Reasons for Granting the Writ

1. The Government's invitation to this Court [10] in *Weiler* v. *United States*, 323 U. S. 606, to reject the "two-witness rule" (or the rule of one witness plus corroboration) in perjury cases was declined. The invitation denoted the high-water mark of Dean Wigmore's virtually single-

[10] See 89 L. Ed. 496.

handed[11] opposition to the "two-witness" rule. Interestingly, it is the literal "*two*-witness" rule which Wigmore disfavors (§2042); he does not attack the modern form of the rule (one witness plus corroboration) (§2043), although his followers lose sight of Wigmore's discrimination in this respect (see preceding footnote). Since *Weiler* was decided in 1945, this Court has rested content with the status of the rule (the Court's last expression on the question was its approving reference to *Weiler* in the following year (1946), in *Fisher* v. *United States*, 328 U. S. 463, 476). However, the prestigious Wigmorean disfavor (or supposed disfavor) has continued to operate non-discriminatingly in various attritive ways against the rule—chiefly, and most distinctively, in cases that have fostered a drastically increased probativeness for defendants' unsworn oral admissions and a drastically reduced force for the traditional canons of "strong" proof (and especially of "strong" *corroboration*) in perjury cases (see below). These attritions, unless this Court takes a hand in the matter, cannot but end with an effective abrogation of the rule of one-witness-plus corroboration in federal perjury prosecutions. The decision here sought to be reviewed imports, we think it may safely be said, the most serious undermining of the rule that has occurred in the federal courts in the post-Weiler era; and it does so in both of the prime sensitive

[11] With the possible exception of *State* v. *Storey*, 148 Minn. 3908, 182 N.W. 613 (1921), every judicial or scholarly authority we have seen in which the above rule is disparaged, including the opinion below (Appendix, *infra*, p. 7a), rests upon Dean Wigmore's name or upon his arguments. Wigmore, On Evidence (3rd Ed.) Vol. 7, pp. 273-277. E.g., *Arena* v. *United States*, 226 F. S. 227 (C.A. 9, 1955), cert den. 350 U. S. 954. *United States* v. *Marachowsky*, 201 F. 2d 5, 11 (C.A. 7, 1953), cert den. 345 U. S. 965; *Cohen* v. *United States*, 27 F. 2d 713 (C.C.A. 2, 1928); 28 George Washington Univ. L. Rev. 786, 789-790; 23 Tex. L. Rev. 406; 51 Colum. L. Rev. 1056; 10 Univ. Fla. L. Rev. 77; 44 Mich. L. Rev. 483.

areas above mentioned—the effect of defendants' admissions, and the strength of required proof.

For (passing for the moment the "admissions" question), conspicuous in this case by their absence and lacking any remotest recognition by either of the courts below, are the (one had thought) established canons of perjury proof that "direct" evidence must be "positive"[12]—which was surely not true of the only purportedly "direct" evidence herein, that of Stern; that perjury proofs as a whole must be "strong", "clear", "convincing"[13]—descriptions which (and see the last footnote herewith) surely do not apply to Stern's equivocations, Mishel's credibility-shaken "adoption" of his grand jury testimony, or Hassell's speculative Exh. 23; that corroboration must be "strong", "convincing", or in some other measure possessing a significant degree of *strength*[14]—qualities one would scarcely attribute

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[12] E.g. *Hart* v. *United States*, 131 F. 2d 59, 61 (C.C.A. 9, 1942); *United States* v. *Otto*, 54 F. 2d 277, 279 (C.C.A. 2, 1931); *Allen* v. *United States*, 194 Fed. 664 (C.C.A. 4, 1912). See 15 A.L.R. 634; 27 A.L.R. 857; 42 A.L.R. 1063.

[13] E.g. *Beckanstin* v. *United States*, 232 F. 2d 1, 4 (C.A. 5, 1956); *Spaeth* v. *United States*, 218 F. 2d 361 (C.A. 6, 1955), opinion by Stewart, J. (referring to the burden of proof in perjury as "stringent", "unique", "extraordinary", "higher"); *United States* v. *Rose*, 215 F. 2d 617, 623 (C.A. 3, 1954) ("clear and convincing * * * to a moral certainty"). *Smith* v. *United States*, 169 F. 2d 118, 121 (C.A. 6, 1948) (same); *Fotie* v. *United States*, 137 F. 2d 831, 840 (C.C.A. 8, 1943) ("excluding every other hypothesis than that of guilt"). Cf. *United States* v. *Wood*, 14 Pet 430, 440 ("unequivocal").

[14] E.g. *Weinheimer* v. *United States*, 283 F. 2d 510, 512, (C.A.D.C. 1960), cert. den. 364 U. S. 932 ("support the witness directly and in important respects"); *Boehm* v. *United States*, 123 F. 2d 791, 809, 810 (C.C.A. 8, 1941), cert. den. 315 U. S. 800 ("satisfactory corroboration"); *Phair* v. *United States*, 60 F. 2d 953, 954 (C.C.A. 3, 1932) ("strong"); *Hashagen* v. *United States*, 169 Fed. 396, 399 (C.C.A. 8, 1909) ("more than sufficient to overbalance" defendant's oath); *Cook* v. *United States*, 26 App. D.C. 427, 430 ("of a strong character, and not merely corroboration in slight particulars"). See also 25 A.L.R. 416, 418; 111 A.L.R. 825, 827, 828, 829, 830-831; Wigmore, On Evidence (3rd Ed.), Vol. 7, p. 278, N.5.

to the Mishel and Hassell proofs of "corroboration" herein; and, above all, *that corroboration as such must be "inconsistent with innocence"* [15]—which would be an egregiously optimistic way to characterize Hassell's "corroborative" Exh. 23, or Mishel's "corroborative" testimony of alleged "admissions" by petitioner. The court below, in abandoning (such was the effect) each of the foregoing canons, put itself in conflict with every other decided case on the subject in every other federal Circuit that has spoken thereon (see preceding footnotes)[16] except for the remarkable decision

[15] E.g. *Doty* v. *United States*, 261 F. 2d 10, 12 (C.A. 10, 1958); *Cuesta* v. *United States*, 230 F. 2d 704, 707 (C.A. 5, 1956); *United States* v. *Neff*, 212 F. 2d 297, 307, 308 (C.A. 3, 1955); *Miranda* v. *United States*, 196 F. 2d 408, 411 (C.A. 9, 1952), cert. den. 344 U. S. 842; *United States* v. *Hiss*, 185 F. 2d 822, 824 (C.A. 2, 1950), cert. den. 340 U. S. 948; *Hart* v. *United States*, 131 F. 2d 59, 60, 61 (C.C.A. 9, 1942); *United States* v. *Isaacson*, 59 F. 2d 966, 968 (C.C.A. 2, 1932); *Gordon* v. *United States*, 5 F. 2d 943, 945 (C.C.A. 8, 1925). And see 42 A.L.R. 1063, 1064; 111 A.L.R. 825, 828, 830; 28 Geo. Wash. U. L. Rev., 786, 787 (Fn. 12), 789; 38 Va. L. Rev. 104, 105.

[16] This, notwithstanding that two of the most frequently cited cases for the rule that corroboration must be inconsistent with innocence are from the Second Circuit (the *Hiss* and *Isaacson* cases, cited in the preceding footnote). The opposite trend in that Circuit, instanced so drastically in the case at bar, seems to have begun in *United States* v. *Lester*, 248 F. 2d 329, 330 (C.A. 2, 1957), where rejection of the traditional canons of strong corroboration was justified by patently erroneous use of a quotation from Wigmore ("It is now everywhere conceded in the United States that a single witness, somehow corroborated, suffices"—§2042). Wigmore was not saying that it was sufficient if corroboration be effected "somehow"; he was merely describing the supplanting of the two-witness rule by the rule of one-witness-plus corroboration, and, after noting the differing standards of corroboration in various jurisdictions, he made the above quoted remark. Far from declaring that *any* corroboration at all ("somehow") suffices, Wigmore was *refraining* from choosing among the diverse rules as to quanta of such proof in perjury. The *Lester* Court's seizure upon and misapplication of this phrase of Wigmore's bespeaks the force of the recurrent judicial impulse to make perjury convictions "easier". See the similar defects of scholarship in this area discussed in the text following this footnote, relating to recent judicial misreadings of *Hammer* v. *United States*, 271 U. S. 620, 627.

in *Arena* v. *United States*, 226 F. 2d 227, 232-234,, 236-237 (C.A. 9, 1955), cert den. 350 U. S. 954,[17] where it is laid down that the only canon for measuring the quantum or strength of corroboration proofs in perjury is that the evidence need only "tend" to show guilt. The Court below seems to have expressly aligned itself with the unique *Arena* decision on this point, for it cited that case at a place in its opinion dealing with the sufficiency of the "corroboration" in our case (Appendix, *infra*, p. 12a). The *Arena* decision is not only solitary outside of the Second Circuit, it is demonstrably the product of erroneous scholarship, for it rests dispositively (226 F. 2d at 232) on an outright misreading of *Hammer* v. *United States*, 271 U. S. 620, 627.

The Court in *Hammer* was not (and scarcely could have been) speaking of any canon relating to corroboration in perjury, for (1) the case involved only a single, *wholly uncorroborated* witness and hence could present no issue of quantum of corroboration; and (2) the Court's words which were deemed operative in *Arena* ("the kind or amount of *other* evidence") unmistakably referred to documentary evidence *in lieu* of testimony by a living witness (within the meaning of *United States* v. *Wood*, 14 Pet. 430, of which the Court was there speaking in *Hammer*), not to *corroboration* of primary or direct evidence. Yet this same misreading of the *Hammer* case has found its way else-

[17] We realize that the denial of certiorari in *Arena* does not call upon us to justify our prayer in the instant Petition (Stern and Gressman, Supreme Court Practice [2nd Ed.], p. 149). However, we note that on its facts *Arena's* suitability for certiorari was virtually *nil*, for not only was the corroborative proof there of very impressive strength; the unsuccessful assertions made against it did not even go to its *quantum* or *strength* to prove the *corpus delicti* but were addressed to its *relevance* to the corpus delicti, a quite distinct problem needless to say, and one which in the *Arena* case was properly found to present no real difficulty.

where too into expressions by federal courts, where it has worked attrition on the "two-witness" rule in other serious ways (see below). E.g. *United States* v. *Marachowsky*, 201 F. 2d 5, 10 (C.A. 7, 1953), cert. den. 345 U. S. 965; *Vetterli* v. *United States*, 198 F. 2d 291, 293 N. (C.A. 9, 1952), vacated and remanded on other grounds, 344 U. S. 872.

The decision here sought to be reviewed carries to a new climax another of the current attritive trends in federal perjury proof:— (1) the court below held that alleged "admissions" of the petitioner, made orally in ordinary conversations preceding the allegedly perjurious statements, were probative as "corroboration" for Stern's "direct" evidence under all three Counts. (2) The Court below alternatively deemed that, as to Count II (re payments to Chait), if Stern's admittedly unsatisfactory "direct" evidence were left out, those "admissions" of the petitioner could serve as the *primary* proof of guilt, "corroborated" by Hassel's Exh. 23. Only one other Circuit has *held* that a defendant's oral unsworn admissions may serve as "corroboration" in a perjury prosecution, *Vetterli* v. *United States*, 198 F. 2d 291, 293 (C.A. 9, 1952), vacated and remanded on other grounds, 344 U. S. 872. But in *Vetterli* (1) the "admissions" were by no means the sole "corroboration" as they are in our case under Counts I and IV; and (2) the "admissions" were made in such circumstances of solemnity as to endow them virtually with the quality of sworn admissions and negate for all practical purposes any chance of non-authenticity, *i.e.*, they were made *in the presence of the defendant's attorney and to an F.B.I. agent.* The *Vetterli* "rule" has been favorably noted in only one other Circuit,[18] and there only by way of *dictum.*

[18] We have found only one other such favorable reference, in a dictum in another Ninth Circuit case. *Umbriaco* v. *United States*, 258 F. 2d 625, 629 N. 6 (C.A. 9, 1958).

(and in connection with written "admissions" given by a husband and wife jointly to government agents, the case involving also substantial additional "corroboration", all of which, however, failed to save the judgment of conviction because of the absence of any "direct" evidence). *Nessanbaum* v. *United States*, 205 F. 2d 93, 98 (C.A. 3, 1953). *Vetterli*, notwithstanding its numerous features distinguishing it from our case and the feebleness of its authority as a "precedent", was the sole precedent cited by the Court below for its holding that Mishel's testimony of petitioner's alleged "admissions" was "corroborative" of Stern under all counts.[19]

In arriving at this conclusion the Court below disparaged even the axiomatic rule that a defendant may not be convicted of perjury on oral admissions alone (Appendix, *infra*, p. 8a, fn. 1); from this it is not difficult to discern the ultimate direction of the thrust of decisions like *Vetterli* and that here sought to be reviewed.

Indeed, that thrust did, in this case, reach significantly still closer to the innermost battlements of the one-witness-plus-corroboration rule, when the Court below made its alternative holding, with respect to Count II, that the alleged admissions could serve as the primary proof of guilt ("corroborated" solely by Hassell's Exh. 23) (Appendix, *infra*, p. 11a). For this *avant-garde* holding the Court below cited no square authority; instead it *extended* the "document" rule of *United States* v. *Wood*, 14 Peters 430, which allows documents of strong authenticity to sub-

[19] It is true that under Count II Stern was also held "corroborated" by Hassell's Exh. 23, but we claim this document would have been barred by the tests of "strong" corroboration "inconsistent wit[illegible]nocence".

stitute as "direct evidence" for one living witness; but this extension of the *Wood* case as here proposed must, again, put the cart before the horse by treating the non-documentary "admissions" as the primary proof of guilt, "corroborated" by the speculative documentary Exh. 23 as the *strong* circumstantial evidence envisaged by *Wood*. Should such become the rule in federal perjury trials it would at long last be impossible for a court to state, as was done in *Umbriaco* v. *United States*, 258 F. 2d 625, 628-629 (C.A. 9, 1958), "We have found no case of perjury in the Federal Courts in which there was present a corroborated, oral, unsworn admission of falsity, and there was no other direct evidence in the case." [20]

Should the decision below go unreviewed and unreversed it cannot but strike a quite-possibly fatal blow to the perjury rule of one-witness-plus-corroboration, for it obliterates the "quantum" canons which are indispensable for the viability of that rule, and it thins to the point of breakthrough the "admission"-proof restrictions which are integral with that rule. The protections of that rule which have made possible the just and wisely-moderated results reached in perjury cases like those cited in the accompanying footnote[21] would lose much of their effectiveness, and the administration of federal criminal justice in perjury prosecutions would lose much of its admirable quality of

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[20] A conviction obtained in just that manner was reversed in *United States* v. *Alu*, 236 F. 2d 179 (C.A. 3, 1956).

[21] *Umbriaco* v. *United States*, 258 F. 2d 625 (C.A. 9, 1958); *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3, 1954); *Fraser* v. *United States*, 145 F. 2d 145 (C.A. 6, 1944), cert. den. 324 U. S. 842; *United States* v. *Otto*, 54 F. 2d 277 (C.A. 2, 1931); *Clayton* v. *United States*, 284 Fed. 537 (C.A. 4, 1922).

civilized temperateness,[22] if the authority of the decision sought to be reviewed should attain finality. It is usually said that ancient purposes of the rule no longer apply and that the only authentic modern reason of policy for its preservation is the protection of witnesses against ill-motivated charges of perjury. Wigmore, On Evidence (3rd Ed.), Vol. 7, pp. 275 *et seq.* Our research discloses, however, that a deeper policy interest, an interest of incomparably more far-reaching social value, is bound up in the rule. We refer to the interest in the *presumption of innocence,* whose preservation has been recognized, from the earliest times, as presenting difficulties of peculiar acuteness in perjury prosecutions and as calling therefore for peculiar exertions to ensure its accomplishment. This policy-purpose behind the rule has not been articulated in the writings of the dominant Wigmorean scholarship. But its existence has been noted many times in the cases, e.g., *R.* v. *Muscot,* 10 Mod. 192 (1714); *United States* v. *Wood,* 14 Pet. 430, 437-439 (exhaustively reciting the text-writers); *Hashagen* v. *United States,* 169 Fed. 346, 399 (C.C.A. 8, 1909); *Clayton* v. *United States,* 284 Fed. 537, 540 (C.A.A. 4, 1922); *Hart* v. *United States,* 131 F. 2d 59, 61 (C.C.A. 9, 1942). Cf. *United States* v. *Isaacson,* 59 F. 2d 966, 968 (C.C.A. 2; 1938). And see 15 A.L.R. 634, 636; 111 A.L.R. 825, 826, 827, 830.

The reasons above advanced for the granting of the writ are believed to satisfy Rule 19(1)(b): (1) The decision below is in conflict with the decisions of the Circuits enumerated

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[22] " * * * No real help is obtained by the use of noble platitudes to the effect that the crime of perjury pollutes the stream of justice at its source with the implied conclusion that it must be stamped out at all costs * * *." *United States* v. *Otto,* 54 F. 2d 277, 279 (C.C.A. 2, 1931).

in footnotes 13, 14, 15, pp. 14, 15, *supra*, as respects the canons or standards governing the quantum of proof for proof of perjury, and, more particularly, the strength of corroboration required. (2) The court below, in its treatment of said question concerning proof in perjury cases, and more particularly in its rulings and holdings on the effect of the testimony of the alleged "admissions" herein, has decided important questions of federal law which have not been, but should be, settled by the Court. Additionally, review should be granted because the important questions presented concerning the rule of one-witness-plus-corroboration in perjury cases, and the injustice of the petitioner's conviction, call for an exercise of this Court's function of determining proper standards for the enforcement of the federal criminal law in the federal courts.

2. The facts noted at pp. 6-8, *supra*, concerning the witness Mishel's adoption of his grand jury testimony at the trial, the prejudice thereby caused to petitioner, and the rejection of petitioner's contentions by the court below (Appendix, *infra*, p. 6a), additionally favor the granting of the writ, in the exercise of this Court's last-mentioned function, and in vindication of the rule of *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234; *Westinghouse Electric Corp.* v. *Wray Equipment Corp.*, 286 F. 2d 491, 493 (C.A. 1, 1961), cert. den. — U. S. — (1961). See also Wigmore, On Evidence (3d Ed.), §1415.

3. The unfairness of the conviction was intensified by the admission of evidence which imputed to the petitioner the commission of the prior unrelated crime of usury; additional cause is thereby presented for the Court's exercise of its aforementioned function. The witness Mishel

read extensively from the grand jury transcript, as seen. The defense attorney at one point perceived that the place was about to be reached in the reading where Mishel had given the grand jury the statement of petitioner's alleged admission that Chait put him into the trucking business (D104a). Knowing that this statement also contained an alleged admission of "shylocking" by petitioner, the defense attorney objected (*ibid.*), but without avail (D105a). This error was the worse because the very question of whether Chait put petitioner into the business was not even within the issues, in that the indictment did not charge falsity on that subject (p. 4, *supra*). It is common knowledge that "shylocking" betokens usury, which is a crime under N. Y. Penal Law §2400. The imputation was reversibly prejudicial. *United States* v. *Tomaiollo*, 249 F. 2d 683 (C.A. 2, 1957); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (C.C.A. 2, 1947), cert. den. 331 U. S. 831; *Pyle* v. *United States*, 156 F. 2d 852 (App. D. C. 1946). Further, the same prejudicial testimony was re-read to the jury, over defense objection, after the jury retired to consider its verdict, and under circumstances which we contend rendered unnecessary and improper the reading of *any* testimony on the area of the case to which the prejudicial portion related (D178a-182a, D198a-211a). The court below found no merit in our contentions presented in this paragraph (Appendix, *infra*, p. 12a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD BAUMAN
Counsel for Petitioner

August 18, 1961

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 352—October Term, 1960.
(Argued April 13, 1961 Decided May 24, 1961.)
Docket No. 26738

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Before:

CLARK, MEDINA and FRIENDLY,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *J.*, convicting appellant under three counts of an indictment for perjury after a jury verdict of guilty. Affirmed.

ARNOLD BAUMAN (Bauman, Epstein & Rice; Arnold Bauman and Frederick R. Biehl on brief), New York, New York, *for Defendant-Appellant.*

EDWARD BRODSKY (Morton S. Robson, United States Attorney for the Southern District of New York, Edward Brodsky and Arthur I. Rosett, Assistant United States Attorneys, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

The principal issue here is the sufficiency of the Government's evidence under the rule, applicable in prosecutions for perjury, "that one witness, without corroborating circumstances, does not suffice," 7 Wigmore, Evidence (3d ed. 1940), p. 273: *Weiler* v. *United States*, 323 U. S. 606, 608 (1945). Sufficient apart from this, it plainly was.

Goldberg was convicted on Counts I, II and IV of an indictment charging perjury in violation of 18 U. S. C. §1621, Count III having been dismissed by the Court. He was sentenced to three years' imprisonment on each count, the sentences to run concurrently, and was fined $2,000 on each count.

The allegedly perjured testimony was given in May and June 1956 before a Federal grand jury investigating possible violations of the laws relating to racketeering, 18 U. S. C. §§1951 and 371. The investigation appears to have been particularly concerned with the activities of one Abe Chait. Defendant Goldberg and Joseph Stern had formed a partnership to engage in the trucking business, known as Stern's Express Co., in August, 1945. The Government was endeavoring to find out from Goldberg whether Chait was responsible for Goldberg's entering into the partnership

and whether Chait received any money from it; Goldberg denied both. Counts I and IV of the subsequent perjury indictment related to Goldberg's denials before the grand jury that he knew Chait before forming the partnership—Count I relating to a simple denial of such knowledge, and Count IV concerning a more circumstantial statement along the same lines, including an answer that Goldberg had first met Chait after formation of the partnership, when he would see Chait "walking through the street," Chait's own business having been "across the street," and a denial that Chait had anything to do with Goldberg's going into Stern's Express. Count II related to Goldberg's denial to the grand jury that Chait ever received any money from Stern's Express. The defense stipulated the materiality of the grand jury testimony.

The Government's case was presented through three witnesses: Joseph Stern, Irving Mishel, who had lived in the same apartment house as Goldberg and who had a long criminal record, and Earl L. Hassell, Jr., an F.B.I. agent who had analyzed the books and records of Stern's Express Co.

To support Counts I and IV, the Government produced testimony by Stern that Stern had seen Goldberg and Chait together once or twice, "talking nice," before August 1945 when Stern's Express started, and that the partnership was arranged at a meeting between Stern and Goldberg which Chait attended. For corroboration the Government relied on testimony given by Mishel, in a manner hereafter discussed, that Goldberg had told Mishel "that when he come out of the service he figured he was going to go back in the Shylocking business but instead he met Big Dick who

was connected with the Chaits • • • And Chait said 'Listen,, I got a trucking business. I will put you in. We will work out a proposition.' So he went in to Stern's Express."

To establish Count II, the Government relied on three pieces of evidence:

(1) *Testimony by Mishel.* This was that Goldberg had told him Chait was getting money from Stern's Express—"something like" $200 a week, although "It could have been $150; it could have been $250."

(2) *Testimony by Stern.* He first said that, a few months after the formation of the partnership, there was discussion between Stern and Goldberg, at the latter's instance, as to some drawing for Chait in the form of expenses and that Goldberg had said "We got to get together" and "We will get together about what we are going to do about it." Then, having refreshed his recollection by reading his testimony before the grand jury, Stern added that he and Goldberg "agreed to a certain extent" that whenever they "drew money Abe Chait would draw money"; that "sometimes" Chait was going to draw as much as Stern and Goldberg; that "Sometimes business was bad, so we don't draw. Sometimes business was better, we draw more"; that Chait did not draw all the time but did draw "when business was better"; that Chait did not take out the same amount as Stern and Goldberg "all the time"; and that "everything was taken out of expenses." Further direct examination of Stern as a hostile witness on the basis of his grand jury testimony weakened rather than strengthened this, and cross-examination weakened it more. Stern ended up by saying, in answer

to an endeavor by the Court to reconcile his testimony on direct and on cross-examination, "I don't know whether he [Chait] got any money exactly."

(3) *Hassel's analysis of the distribution in the Cash Disbursements Book of Stern's Express Co. of the cash checks allocated to payroll, "expenses" and drawings.* This analysis showed that from August 3, 1945 to September 30, 1947, the drawings had been $200 and that, for each week except two, the unidentified "expenses" were at least $100 but rarely exceeded $135—the "expenses" for the last ten weeks of the period, for example, averaging $114. Commencing with the week ending October 7, 1947 and continuing through May 13, 1951, the drawings increased to $250, an equal division between Goldberg and Stern being shown from August 1, 1950. In that period, the amounts for unidentified "expenses" were never less than $125 and usually were rather more; in the ten weeks beginning October 7, 1947, for example, the average jumped from the $114 of the preceding ten weeks to $142. From May 22, 1951 through October 26, 1953, Goldberg's and Stern's drawings were increased to $150 each; coincidentally, the unidentified expenses, which had averaged $163.70 per week in the ten weeks before the increase, jumped to an average of $183.60 in the ten weeks thereafter—only on three occasions after May 22, 1951, were they less than $170 per week and never did they fall as low as $150.

We deal at this point with appellant's claim that the testimony of Mishel must be disregarded on the ground

that Mishel had no present recollection but merely acknowledged he had given certain testimony before the grand jury. Although we may sympathize with the difficulties of a prosecutor in examining a witness who, if not actively hostile, was exceedingly timorous, we should have to sustain the legal contention if it were factually made out, *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 234 (1940); *Westinghouse Electric Corp.* v. *Wray Equipment Corp.*, 286 F. 2d 491-493 (1 Cir. 1961), cert. denied —— U. S. —— (1961); 5 Wigmore, Evidence (3d ed. 1940), § 1415. It is not. Although appellant's characterization may not be incorrect as to Mishel's direct testimony, Mishel went considerably further before leaving the stand. After sharp interrogation by the defense as to his criminal record, the witness experienced an access of what the jury could have regarded as either hostility or confidence. He thought it "about time that I tell the truth and that is it and I decided to tell the whole truth." When asked "Is it the truth that you recall or don't recall these conversations which you say you had with Mannie Goldberg about Chait, now as you sit here?", he responded "How many times did I say I recall it as being true and I recall it as being absolutely true"; and "Listen. Those things took place • • • These incidents took place 10, 12 years ago, counselor, and with all due respect to you, as you know, I had been under quite a bit of pressure the last few years. So I wanted to refresh." Finally when asked again whether he had any independent recollection, he replied, "I recall conversations between Mannie and myself and many other parties regarding Chait."

Appellant contends that the special evidentiary rule in perjury trials cannot be met by the testimony of one

witness as to facts inconsistent with the truth of the allegedly perjurious utterance and of another witness as to an oral admission by the defendant, which was all the Government presented as to Counts I and IV; and still less by testimony as to an oral admission by the defendant plus circumstantial evidence, which the appellant urges and the Government, we think needlessly, seems to concede to have been the proof with respect to Count II. Disposition of these contentions will be aided if we first examine the rationale of the special perjury rule and the status of admissions by the defendant in perjury cases.

The historical origins of the rule that a conviction for perjury may not be had on the basis merely of "oath against oath," *Rex* v. *Fanshaw*, Skinn. 327 (1693); *Rex* v. *Muscot*, 10 Mod. 192 (1714); *Weiler* v. *United States*, *supra*, at 611, are illuminatingly described in 7 Wigmore, Evidence (3d ed. 1940), pp. 273-275. In our time the rule rests on society's obligation to protect a witness "from oppression, or annoyance, by charges of having borne false testimony," from those "against whom his evidence tells," Best, Evidence (1849), §§605-606, quoted in 7 Wigmore, Evidence, at p. 276. Logically that policy would be satisfied by requiring added proof only when the "oath" relied on by the prosecutor is that of a person in an adversary relation to the defendant. However, the rule clearly goes further; it is most accurately stated in the negative fashion that Wigmore employs, "one witness, without corroborating circumstances, does not suffice," p. 273. It differs from the special rule in treason trials in that two witnesses are not always required; indeed, a conviction may sometimes be had when there are none at all, *United States* v. *Wood*, 14 Pet. 430 (1840); *United States* v. *Collins*, 272 F. 2d 650

(2 Cir. 1959), save as to the identity of physical objects having circumstantial relevancy.

The special status of evidence of an admission in prosecutions for perjury rests upon the nature of the offense. The relevancy of a defendant's prior or subsequent statement of fact contrary to his testimonial assertion is that in the absence of evidence of a change in defendant's knowledge, the jury may permissibly infer that one or the other utterance did not reflect defendant's belief at the time it was made. The difficulty is that, without more, there is no more reason for thinking the admission to have been true and the testimony false than the reverse. This reason underlies the holdings that a perjury conviction may not be had solely on the basis of oral admissions contrary to the allegedly perjurious statement, even if several witnesses testify to the admissions. *Clayton* v. *United States*, 284 Fed. 537 (4 Cir. 1922); *Phair* v. *United States*, 60 F. 2d 963 (3 Cir. 1932).[1]

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[1] In *McWhorter* v. *United States*, 193 F. 2d 982 (5 Cir. 1952), this principle was held to require reversal of a conviction based upon an admission, proved by three witnesses, which not merely contradicted the allegedly perjurious statement but affirmatively stated the latter was false; the state cases on this are divided and we would not wish to be understood as necessarily agreeing with the *McWhorter* decision. The Court there sought to distinguish our affirmance of a conviction in *United States* v. *Buckner*, 118 F. 2d 468 (2 Cir. 1941), where the admission of falsity was made by the defendant on the stand in the perjury trial.

It was said in *Remington* v. *United States*, 191 F. 2d 246, 249 (2 Cir. 1951), in a discussion preliminary to the decision, that "the law is well settled that his [defendant's] declaration, if oral, will not satisfy the rule, although they will if written and adequately corroborated," citing *United States* v. *Wood*, *supra*. The first part of the statement accords generally with the cases cited above, although it is hard to see why in a case where, e.g., two or more witnesses testified that the defendant, repeatedly, and under varying circumstances, had made statements differing from his sworn testimony, a jury could not be convinced beyond rea-

Examining the evidence on Counts I and IV in the light of this analysis, we see no basis for doubting that Stern's testimony that Goldberg had known Chait before the formation of the partnership was adequately corroborated by Mishel's testimony that Goldberg had admitted as much. The policy underlying the rule against a conviction simply by "oath against oath" is met when Stern's oath is supported by testimony of a second witness sufficient to "confirm the single witness' testimony and to induce the belief of it," 7 Wigmore, Evidence, p. 277, even though the testimony of the second witness is to a statement emanating from the defendant himself. And the objection that invalidates a perjury conviction resting solely on the basis of statements by the defendant of facts different from what he said under oath, namely, that, without more, there is no basis for the jury's finding the testimonial utterance rather than the inconsistent one to have been false, is inapplicable when the admission, always relevant but generally not alone

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sonable doubt that the defendant did not believe the latter to be true. One may equally doubt that a single written admission would invariably suffice. True, such an admission differs from the usual extra-judicial oral admission in not being open to the general infirmities of mistake or prevarication by the declarant or to the "grudge" objection which affords the policy basis for the special perjury rule; but there is still the question whether the testimony or the admission was what defendant believed. The written materials in the *Wood* case in the Supreme Court were not "admissions" in the sense of recitals of the facts otherwise than the defendant had sworn; they were invoices and business letters which showed defendant knew the value of the goods to be more than the prices stated in his sworn customs entry. A fair case could be made that the rule with respect to conviction on admissions alone ought be simply that the court must be satisfied that the jury could reasonably be convinced beyond reasonable doubt that the admission represented defendant's true belief, plus, if the admission or admissions be oral, that it or they must be proved by more than a single witness.

sufficient, is used to corroborate testimony by another witness as to objective facts which themselves afford a basis for finding that the admission represented what defendant knew to be the truth. Under these circumstances the usual rule, that admissions "have such testimonial value as belongs to any testimonial assertion under the circumstances," 4 Wigmore, Evidence (3d ed. 1940), pp. 5-6, applies. Hence, as said in *Vetterli* v. *United States*, 198 F. 2d 291, 293 (9 Cir. 1952), vacated and remanded on other grounds, 344 U. S. 872 (1952), "We do not believe an extra-judicial admission made by an accused is insufficient as corroboration simply because it is such."

With respect to Count II, appellant relies on the statement in *Umbriaco* v. *United States*, 258 F. 2d 625, 628 (9 Cir. 1958) that "a corroborated, oral, unsworn admission of falsity" is never sufficient to support a conviction for perjury, no matter how strong the circumstantial corroboration may be. Although we have no difficulty with the result there reached, for reasons pointed out in the concurring opinion of Judge Pope, we think the rule is not so rigid as the majority assert. Any such view seems quite inconsistent with the Supreme Court's decision in *United States* v. *Wood, supra*, that there may be a conviction for perjury without the testimony of any "witness" at all when the circumstantial evidence is sufficiently probative.[2]

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[2] It was there said, at 440, "If we will but recognize the principle upon which circumstances, in the case of one witness, are allowed to have any weight, that principle will carry us out to the conclusion, that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life."

If the books of Stern's Express had contained a column labelled as payments to Chait, that would have been enough to support a conviction without the testimony of any witness save as to their authenticity. *United States* v. *Wood*, *supra*; *United States* v. *Collins*, *supra*. The same would be true if the books had contained a code reference to Chait and a witness supplied the key to the code. We would suppose, therefore, the Government here could bring itself within *United States* v. *Wood* by combining the book entries of Stern's Express with Mishel's testimony as to an admission by Goldberg which could convince the jury beyond reasonable doubt that the effect of the records was the same as if Chait's name had appeared, or, putting the matter more broadly, that the objection to a perjury conviction solely on the basis of an admission is removed by records, or other circumstantial evidence, affording a basis for the jury's being convinced beyond reasonable doubt that the admission represented defendant's true belief and the testimonial assertion was the falsehood.

However, this case does not require us to go so far. There was more evidence on Count II than Mishel's testimony as to the admission about payments to Chait and the compelling inference from the course of the book entries in the light of that.[3] As previously noted, Stern testified that payments were made to Chait; to be sure, his testimony was halting and was weakened on later examination, but that was for the jury to weigh under all the circumstances, on instructions as to which appellant makes no complaint.

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[3] Appellant's argument that the total expenses of the business were increasing fails to account for the synchronization of the jumps in unidentified "expenses" with increases in the partners' drawings.

Hence Stern provided the testimony of one witness as to the objective facts on Count II, as he had on Counts I and IV, and the books would have been sufficient corroboration alone, *a fortiori* when coupled with defendant's admission to Mishel. See *Arena* v. *United States*, 226 F. 2d 227 (9 Cir. 1955); 7 Wigmore, Evidence (3d ed.), §2042(2).

The chief of appellant's other points is that he was prejudiced when the prosecutor, knowing that Mishel was following a transcript of his own grand jury testimony, asked a question bound to elicit a reading of the answer, quoted above, which included the word "shylocking." Appellant contends this imputed to him the commission of the crime of usury, New York Penal Law, §2400, and that the prejudice was later compounded; after the jury had requested a reading of the testimony as to when appellant had met Chait and had retired without having been read the offending passage, which the reporter had not yet found, they were then recalled to hear it. A short answer to the first complaint is that defense counsel, who also had a copy of the grand jury transcript before him, instead of merely objecting generally to the prosecutor's clearly proper question "Did the defendant ever tell you that Abe Chait put him into Stern's Express?", could have asked that the witness be cautioned or could have immediately moved to strike or requested an appropriate admonition to the jury. Furthermore, we do not think the jury would have taken the alleged reference to "shylocking" as an admission of previous crime. The later reading of this portion of the transcript to the jury was entirely innocent; it clearly fell within the jury's request, as defense trial counsel properly conceded, and the Court warned the jury that the reading

was not to be considered as emphasizing this testimony, which must be taken by them in conjunction with all the rest.

We likewise find no merit in appellant's objections to the Court's failure to hold a hearing to settle the record. The material alleged not to have been taken down by the reporter consisted of colloquy between the jury and the judge when the jury asked that certain of the testimony be read. No point was made of this omission of the reporter until the above-mentioned testimony of Mishel was located. After the trial Judge Dawson reviewed the transcript and stated in a memorandum that, with two exceptions noted by him, it was correct; this procedure was proper under F. R. Crim. Proc. 39(6)(1) and F. R. Civ. Proc. 75(h). Moreover, appellant has not pointed to anything in the colloquy alleged to have been omitted that could affect our decision.

Affirmed.

MEDINA, *Circuit Judge* (concurring):

I concur in the affirmance of the judgment of conviction and agree with the reasoning of my brother Friendly's opinion and the principles stated therein. What troubles me somewhat is the statement: "If the books of Stern's Express had contained a column labelled as payments to Chait, that would have been enough to support a conviction without the testimony of any witness save as to the authenticity." The facts of the two cases cited in support of this statement, *United States* v. *Wood*, 1840, 14 Pet. 430, and *United States* v. *Collins*, 2 Cir., 1959, 272 F. 2d 650, appear to me to be "far stronger, more cogent and more

convincing," 272 F. 2d at page 652, than the direct testimony of one witness together with some corroborating proof, in accordance with the rule commonly applied in perjury cases. Whether or not this would be the case on my brother Friendly's hypothesis might well depend upon a variety of attendant circumstances, and upon what constitutes the proof of authenticity in a particular case. I would prefer to cross that bridge when we come to it.

APPENDIX

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Before CLARK, MEDINA, and FRIENDLY, *Circuit Judges.*

On Petition for Rehearing.

ARNOLD BAUMAN and FREDERICK R. BIEHL,
of Bauman, Epstein & Rice,
New York City,
for defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
H. R. M.
H. J. F.
U.S.C.JJ.

Aug. 10, 1961

APPENDIX

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX

Statutes Involved

TITLE 18, USC SECTION 1621:

> "Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or submits any material matter which he does not believe to be true, is guilty of perjury; * * * "

NEW YORK PENAL LAW, ARTICLE 214—USURY:

> "§ 2400. Taking security upon certain property for usurious loans
>
> A person who takes security, upon any household furniture, sewing machines, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry, for a loan or forbearance of money, or for the use or sale of his personal credit, conditioned upon the payment of a greater rate than six per centum per annum or, who as security for such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, upon the like condition, and permits the pledger to retain the possession thereof is guilty of a misdemeanor."

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No. 355

In the Supreme Court of the United States

OCTOBER TERM, 1961

MANNIE GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 355

MANNIE GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (2 R. 5–17;[1] Pet. App. 1a–14a) is reported at 290 F. 2d 729.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961 (2 R. 18; Pet. App. 15a). A petition for rehearing was denied on August 10, 1961 (2 R. 29; Pet. App. 16a–17a). The petition for a writ of certiorari was filed on August 23, 1961. The juris-

[1] On file with the Clerk of this Court is a two-volume record and a detailed accounting analysis introduced at trial as Government Exhibit 23. Volume I of the Record (pp. 1–211) is referred to herein as "1 R."; Volume II (pp. 1–63) is designated "2 R."

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient, under the special rules applicable in perjury cases, to sustain petitioner's conviction.

2. Whether the trial court properly left to the jury the question of the credibility of the government witnesses.

3. Whether prejudicial error resulted when, in answer to a question by the prosecutor, government witness Mishel read aloud a portion of his own grand jury testimony which included reference to petitioner as "shylocking".

STATUTE INVOLVED

United States Code, Title 18, Section 1621, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

A four-count indictment returned on November 20, 1956, in the United States District Court for the Southern District of New York, charged that peti-

tioner committed perjury, in violation of 18 U.S.C. 1621, in his testimony before a federal grand jury investigating possible violations of federal criminal statutes. Count one charged that petitioner wilfully testified falsely under oath before the grand jury on May 22, 1956, that he had not known nor met Abraham Chait before the formation, in August 1945, of Stern's Express Company, a trucking partnership (1 R. 7–8). Count two charged that on the same date petitioner testified falsely that Chait never received any money from Stern's Express Company (1 R. 8–9). Count four alleged that petitioner testified falsely before the grand jury on June 21, 1956, when he again denied that he had known Chait before the formation of the partnership (1 R. 11–13).[2]

Following a jury trial, petitioner was found guilty on each of counts one, two and four (1 R. 183). He was sentenced to three years' imprisonment on each of these counts, to run concurrently, and fined $2,000 on each count (1 R. 193–194, 195).

A. THE EVIDENCE[3]

1. *Counts one and three.*—Petitioner and Joseph Stern had been partners in Stern's Express Company,

[2] The third count, charging that petitioner committed perjury on June 21, 1956, when he testified before the grand jury that Chait was not a partner in Stern's Express (1 R. 10–11), was dismissed at the close of the government's case (1 R. 131).

[3] At the outset of the trial, it was stipulated that petitioner had testified under oath before the grand jury on May 10, 22, and June 21, 1956; that the transcript of his grand jury testimony introduced at the trial was an accurate recordation of that testimony; and that the questions asked of petitioner before the grand jury, and contained in the indictment, were material (1 R. 15, 28–30).

a trucking firm organized in August 1945 and dissolved in October 1953 (1 R. 31).

Stern testified that, before the formation of the partnership in August 1945, he had seen petitioner and Chait together once or twice "talking nice" (1 R. 54; see 1 R. 32, 52-53), and that Chait had attended the organizational meeting of the partnership together with Stern and the petitioner (1 R. 32). To corroborate Stern's eyewitness testimony, Irving Mishel testified for the government that petitioner had told him (prior to petitioner's grand jury testimony in 1956) of a conversation with Chait during which Chait had told petitioner he was going to put petitioner in his (Chait's) trucking business and that they would work out "a proposition" (1 R. 105). Shortly thereafter Stern's Express Company was formed. Mishel further testified that he believed petitioner knew Chait before the end of the Second World War (1 R. 105–107; see 1 R. 108).[4]

2. *Count two.*—The evidence in support of count two—that petitioner testified falsely before the grand jury in claiming that Chait had received no money from Stern's Express Company—stemmed from three separate sources.

a. On direct examination, Stern testified that, a few months after the organization of the firm, he and petitioner discussed some "expense drawing" for Chait (1 R. 34–39). After refreshing his recollection from

[4] Although not particularized as to time, Mishel testified that he and petitioner met Chait in a barber shop "many a Saturday," and that on one occasion petitioner took him to visit Chait in his home at Peekskill, New York (1 R. 108).

his 1956 grand jury testimony (1 R. 39–40), Stern recalled that it was decided that Chait was to draw money from the business (1 R. 40–41) and that it was "agreed to a certain extent" that, when Stern and petitioner drew money from the business, Chait was also to draw funds (1 R. 40). Stern further stated that Chait drew money "[w]hen business was better" (1 R. 41), that at such times he drew as much as each of the partners and that the money given to Chait was "taken out of expenses" (1 R. 42).

About halfway through Stern's direct testimony, the trial court allowed the prosecutor to examine him as a hostile witness with respect to his grand jury testimony, because of his vague, guarded and, at times, unresponsive testimony (1 R. 43). During the interrogation that followed, Stern testified that as far as he knew Chait drew the same amount of money from the business as did the partners (1 R. 43–46), and that Chait "was part of the business" (1 R. 50). He thereafter testified that he never gave any money to Chait and that he did not know whether petitioner had given Chait money (1 R. 49; see also Stern's cross-examination, 1 R. 61, 70–71). In answer to questions propounded by the trial judge, Stern stated that he did not know "whether [Chait] got any money exactly" (1 R. 72). Just before the close of his testimony, on further inquiry from the trial court, he admitted that he had discussed "expenses" with petitioner (1 R. 73–74), who told him that money for Chait was included in the labor expense of the business (1 R. 75).

b. After referring extensively to his grand jury testimony (*e.g.*, 1 R. 93–94, 95–96), and affirming that his answers were "true now as then" (1 R. 102, 105, 107, 108, 117), Mishel recalled that, some ten to fifteen years before, he had discussed Stern's Express Company with the petitioner and that some of these conversations related to Abe Chait (1 R. 94–96). He further recalled petitioner telling him of payments to Chait from Stern's Express Company, but not the exact amount (1 R. 101–102; see 1 R. 103–104).[5]

c. Earl Hassel, Jr., a special agent of the Federal Bureau of Investigation, testified that he had made an analysis of the books and records of Stern's Express Company in order to determine the allocation of cash checks to payroll expenses, and to the drawing of the partners during the life of the partnership. This analysis, which was introduced at the trial (G. Ex. 23;[6] see 1 R. 86–87), revealed that from August 3, 1945, until September 30, 1947, petitioner and Stern drew $100 each per week, charged to the "drawing" account. For this same period of time, except for two weeks, the checks allocated to unidentified "expenses" amounted to at least $100 per week. For the last ten weeks of this period, payments out of the expense account averaged $114 per week. From

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[5] In his testimony before the grand jury, Mishel had stated that petitioner had informed him that Chait was receiving $150 or $200 a week from Stern's Express (1 R. 103–104). At the trial, Mishel stated: "That was my answer then; it is my answer now. I don't recall exactly what it was. All I know is this is what I stated, and anything I stated was the truth" (1 R. 104).

[6] As already noted (see fn. 1, *supra*, p. 1), this exhibit is part of the record filed with the Clerk of this Court.

October 7, 1947, until May 13, 1951, petitioner and Stern shared $250 per week, while the amount drawn from the expense account was never less than $125 per week. From May 22, 1951, through October 26, 1953, each of the partners' drawings increased to $150 per week, and the expense account correspondingly rose, never falling below that amount (see 1 R. 124–128).

B. THE COURT'S INSTRUCTIONS

After the trial court charged the jury as to reasonable doubt (1 R. 161–163), stated the elements of the offense (1 R. 164–165) and read material portions of the indictment (1 R. 166–167), it marshalled the evidence (1 R. 169–170) and pointed out that it was ultimately for the jury "to decide what credence, if any, you will give to it" (1 R. 170). The court further instructed the jury that a conviction of perjury must be based upon the testimony of two witnesses, or the direct testimony of one witness corroborated by other substantial evidence (1 R. 170–171), and defined direct testimony as that "which proves the truth of the matter asserted without requiring any inference: other than the inference that what the witness reports to be the fact is, in fact, the fact" (1 R. 171). The court continued (1 R. 172):

> If you, the jury * * * find that there has been direct testimony of two credible witnesses from which he [*sic*] can conclude beyond a reasonable doubt that the defendant did not believe to be true that part of the defendant's testimony set forth in a count of the indictment, or if the direct testimony of one credible witness cor-

> roborated by other evidence convinces you beyond a reasonable doubt that that specified testimony of the defendant was wilfully false, then the requisite quantity and quality of proof has been submitted to prove the crime of perjury.

On the credibility of the witnesses the judge charged (1 R. 173):

> You will judge it by applying your ordinary, everyday common sense. How did the witness impress you? Was the testimony consistent with any undisputed facts in the case? Was his testimony corroborated?
>
> * * * * *
>
> * * * What you accept or reject is up to you. You are the triers of the facts.

ARGUMENT

1. The government's evidence in the present case meets the standard applicable in perjury trials that "[t]he Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of * * * one witness and corroborating circumstances." *Weiler* v. *United States*, 323 U.S. 606, 607.

a. The evidence on counts one and four consisted of the eyewitness testimony of Stern that, before the formation of Stern's Express Company in 1945, he had seen petitioner and Chait together, and that he, petitioner and Chait were present at the organizational meeting of Stern's Express. In corroboration, Mishel testified to conversations with petitioner (held before petitioner's grand jury appearance) which

substantiated Stern's testimony that petitioner had known Chait before the formation of Stern's Express. (See the Statement, *supra*, p. 4.)

Contrary to petitioner's contentions (Pet. 17–18), the testimony of Mishel was sufficient as corroborative evidence in the perjury prosecution even though it pertained only to petitioner's oral admissions, because it substantiated "the testimony of a single witness," Stern, who had sworn "to the falsity of the alleged perjurious statement" (*Weiler* v. *United States*, *supra*, 323 U.S. at 610). See, *e.g.*, *Vetterli* v. *United States*, 198 F. 2d 291, 293 (C.A. 9), vacated and remanded on other grounds, 344 U.S. 872; *United States* v. *Nessanbaum*, 205 F. 2d 93, 98 (C.A. 3); *Umbriaco* v. *United States*, 258 F. 2d 625, 629, n. 6 (C.A. 9); *United States* v. *Zborowski*, 271 F. 2d 661, 664 (C.A. 2); cf. *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 408 (C.A. 2); *DeCasaus* v. *United States*, 250 F. 2d 150 (C.A. 9), certiorari denied, 356 U.S. 949. Therefore, Stern's direct testimony, together with Mishel's corroborative testimony, was sufficient to satisfy the rule of one witness plus corroboration.

b. The evidence on count two [7] rests upon the testimony of Stern that Chait drew money out of a business expense account, the testimony of Mishel that petitioner had told him Chait was drawing weekly

[7] Since the sentences of imprisonment for three years run concurrently on each of the three counts, we believe it is unnecessary to consider the questions raised with respect to count two as far as the prison sentence is concerned. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Claassen* v. *United States*, 142 U.S. 140, 146. But since petitioner was also fined $2,000 on each count, we shall discuss count two on the merits.

funds from Stern's Express, and the books and records of the company reflecting a weekly allocation to an expense account of sums roughly equivalent to the amounts drawn weekly by each of the partners (see the Statement, *supra*, pp. 4–7). As the court below held, Stern's testimony that "payments were made to Chait" satisfied the one witness rule, and was amply corroborated by the books and records of the partnership, as well as petitioner's admission to Mishel (Pet. App. 11a).

Moreover, even if petitioner's oral admissions to Stern were considered to be the only source of Stern's knowledge as to the payments to Chait,[8] the evidence on count two would have been sufficient. Although "direct proof" is undeniably an essential element in

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[8] It strains credulity that Stern, a partner in the business and obviously concerned with its finances, would not know from his own observations of Chait's financial interest. Throughout most of Stern's direct testimony, the indications are that he was talking from personal knowledge (see, *e.g.*, 1 R. 41–50). Thereafter, becoming more guarded and vague, he stated that he did not know who gave Chait his weekly share; that he never did; and that he did not know whether Chait "got any money exactly" (1 R. 48–49, 61, 70–71, 72). When, toward the close of his testimony, the trial court pressed him as to the source of his knowledge that money was paid to Chait, he said petitioner told him it was included in expenses (1 R. 75). (See the Statement, *supra*, pp. 4–5.) The government conceded at trial that the only proof on count two came "from the admissions of the defendant and the admissions are corroborated by the documentary evidence * * *" (1 R. 127). The court of appeals stated that it believed the government "needlessly" conceded the nature of the proof on count two (Pet. App. 7a), and held that Stern "provided the testimony of one witness as to the objective facts on Count II" (Pet. App. 12a).

a perjury case (see *United States* v. *Remington*, 191 F. 2d 246, 249 (C.A. 2), certiorari denied, 343 U.S. 907), it is not limited in meaning to eye-witness observations, but may also include testimony which is direct in the sense that, in and of itself, it has a rationally direct and compelling tendency to establish the fact to be proved even though some process of interpretation may be necessary (cf. *United States* v. *Wood*, 14 Pet. 430; *United States* v. *Collins*, 272 F. 2d 650 (C.A. 2), certiorari denied, 362 U.S. 911; see also *Radomsky* v. *United States* 180 F. 2d 781, 783 (C.A. 9)). In *Regina* v. *Hook*, 27 L.J. M.C. (N.S.) 222, 31 L.T. (O.S.) 221 (1858), the English court accepted, as proof of falsity of a policeman's testimony that he had not seen anyone leave a publican's house, evidence that the policeman had shortly before stated a number of times that he had seen such persons leave, plus the corroborating evidence that people did in fact leave the house at a specified time See also *Berwick's Case*, How. St. Trials 367 (1746); Foster, *Crown Cases and Crown Law*, pp. 10, 18, 243–244. In the present case, petitioner's admissions to Stern were stronger than ordinary admissions as to a past act because they were made to a partner in the course of business with respect to the affairs of the business. The admissions should therefore qualify as "direct proof," as similar admissions did in the *Hook* case, and, together with the corroborative evidence of petitioner's admission to Mishel *at a different time* and of the books and records of

the business,[9] should be considered to be sufficient for purposes of sustaining the perjury conviction on count two.[10]

c. Petitioner urges further that his entire conviction on all counts must fall because the corroborative evidence was not inconsistent with his innocence (Pet. 15–17) and did not independently tend to show all the elements of perjury (see cases cited in Pet. 15, n. 15). But in *Weiler* v. *United States, supra,* 323 U.S. at 610, this Court stated that all that was necessary in order that corroborative evidence be sufficient for purposes of sustaining a perjury charge was that the evidence substantiate "the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement," and that the evidence be "trustworthy." And in *Opper* v. *United States,* 348 U.S. 84, 93, the Court stated, with respect to the evidence necessary to corroborate a confession or oral admission, that "the corroborative evidence need not be sufficient, independent of the statements, to establish

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[9] *McWhorter* v. *United States*, 193 F. 2d 982 (C.A. 5), is thus inapposite since in that case the *only* evidence of falsity was the testimony of two witnesses to the *same* statement of the accused contradictory to her allegedly perjurious testimony.

[10] While the majority opinion in *Umbriaco* v. *United States*, 258 F. 2d 625 (C.A. 9), noted that an oral admission of the accused plus corroboration was insufficient to meet the special perjury rule, this statement was not necessary to the decision, since, as the concurring opinion pointed out (258 F. 2d 629–630), the defendant's allegedly perjurious statement under oath, in which she admitted a single act of intercourse for money, did not support the charge in the indictment that she had sworn falsely that she was not a prostitute. See the discussion of *Umbriaco* by the court below (Pet. App. 10a).

the *corpus delicti*. It is necessary, therefore, to require the Government to introduce independent substantial evidence which would tend to establish the trustworthiness of the statement." Accord, *Smith* v. *United States*, 348 U.S. 147, 156. Since the type of evidence necessary for corroboration in perjury cases is comparable to the type necessary in confession or admission cases (see *Warszower* v. *United States*, 312 U.S. 342, 347–348), the corroborative evidence in the present case was not invalid even though it did not independently tend to show all the elements of perjury.

2. Actually, what much of petitioner's argument amounts to is a claim that the testimony of the government witnesses was neither trustworthy nor credible within the principles established in *Weiler* v. *United States*, *supra*, 323 U.S. at 610 (see Pet. 5–9). As to Stern, petitioner contends that his testimony was inconsistent and unresponsive and hence unworthy of belief (Pet. 8, 14). As to Mishel, petitioner alleges that the witness simply adopted his grand jury testimony, thereby fatally prejudicing petitioner's case (Pet. 14, 21).

a. There is no question but that Stern proved to be a reluctant witness, who grudgingly and hesitatingly revealed what he knew of petitioner's association with Chait, and Chait's financial drawings from the firm. It is also true that his answers were at times indefinite and hesitant (see the Statement, *supra*, p. 2). But, as the trial court charged in accord with well settled principles, it was for the jury "to recollect what [Stern's] testimony was and to decide what credence,

if any, you will give to it" (R. 169–170).[11] See, *e.g.*, *Kimes* v. *United States*, 240 F. 2d 301, 302 (C.A. 5), certiorari denied, 354 U.S. 912; *United States* v. *Guido*, 251 F. 2d 1, 5 (C.A. 7), certiorari denied, 356 U.S. 950.

b. The record reveals that Mishel did not, as petitioner says (Pet. 21), simply adopt his grand jury testimony. While it is true that he repeatedly referred to it to refresh his recollection, affirming time and time again that his answers were "true now as then" (R. 102, 105, 107, 108, 111), he "went considerably further before leaving the stand," as the court below noted (Pet. App. 6a). On cross-examination, Mishel stated that he recalled his conversation with petitioner concerning Chait as "being true" (1 R. 117), and explained that he referred to his grand jury testimony because the "incidents took place 10, 12 years ago * * *, I had been under quite a bit of pressure the last few years. So I wanted to refresh" (*ibid.*) Cf. *Cox* v. *United States*, 284 F. 2d 704, 708–709 (C.A. 8), certiorari denied, 365 U.S. 863. Since the determination of the trustworthiness and credibility of corroborative evidence is "a function which belongs exclusively to the jury" (*Weiler* v. *United States*, *supra*, 323 U.S. at 610), and since this question was settled in the present case by a jury under proper instructions, the issue is not one for review by this Court.

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[11] In speaking of Stern's testimony, the court of appeals observed: "[T]o be sure, his testimony was halting and was weakened on later examination, but that was for the jury to weigh under all the circumstances, on instructions as to which appellant makes no complaint" (Pet. App. 11a).

3. During the course of Mishel's direct examination, he was asked whether petitioner had ever told him that Chait had put him into Stern's Express Company. Defense counsel's objection that the question was "not in the issues and prejudicial and irrelevant" was overruled by the trial court (1 R. 104). Mishel was then permitted to read the response he had given before the grand jury in order to refresh his recollection. After stating that such testimony was "true now as then," he read it aloud (1 R. 105):

> Well, he told me that when he come out of the service he figured he was going to go back in the shylocking business but instead he met Big Dick who was connected with the Chaits. I don't know Dick's last name. I think its Kaminsky, Komesky or something like that. And Chait said, "Listen, I got a trucking business. I will put you in. We will work out a proposition." So he went in to Stern's Express.

After the case had been submitted to the jury, a number of the jurors requested that the testimony of Mishel and Stern be read to them on the issue whether petitioner knew Chait before the formation of the partnership (1 R. 178–179). Shortly after some of this testimony had been read as requested, it was discovered that the excerpt from Mishel's testimony quoted above had been overlooked (1 R. 179–180). The excerpt was then read to the jury, the trial judge explaining why it had not been read to them earlier, and directing the jury not to get the impression that the court is "emphasizing or anybody is emphasizing this testimony. It has to be taken in conjunction

with all the other testimony, but it is relevant to the question of the jury" (1 R. 182).

Petitioner argues that the reading of this grand jury testimony to the jury on two occasions was fatally prejudicial because of its reference to "shylocking" which imputed to him the commission of the crime of usury under the New York Penal Law (Pet. 21–22). The complete answer to this argument was given by the court below (Pet. App. 12a–13a):

> * * * [D]efense counsel, who also had a copy of the grand jury transcript before him, instead of merely objecting generally to the prosecutor's clearly proper question * * * could have asked that the witness be cautioned or could have immediately moved to strike or requested an appropriate admonition to the jury. Furthermore, we do not think the jury would have taken the alleged reference to "shylocking" as an admission of previous crime. The later reading of this portion of the transcript to the jury was entirely innocent; it clearly fell within the jury's request as defense trial counsel properly conceded, and the Court warned the jury that the reading was not to be considered as emphasizing this testimony, which must be taken by them in conjunction with all the rest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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